

STATE OF MICHIGAN
COURT OF APPEALS

HERBERT SMITH,

Plaintiff-Appellant,

v

CITY OF PONTIAC,

Defendant-Appellee.

UNPUBLISHED

June 12, 2008

No. 277771

Oakland Circuit Court

LC No. 2006-073639-NO

Before: Whitbeck, P.J., and O’Connell and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court’s grant of defendant’s motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

This Court reviews a trial court’s decision regarding summary disposition pursuant to MCR 2.116(C)(10) de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition pursuant to MCR 2.116(C)(10) is proper when, upon examining the affidavits, depositions, pleadings, admissions and other documentary evidence, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).

Plaintiff first contends that the trial court erred in concluding that the open and obvious doctrine applied despite the fact that the cause of action arose out of an allegation of a breach of a statutory duty. We agree. Plaintiff brought his cause of action pursuant to MCL 691.1402, subsection 1 of which provides in pertinent part, “Except as otherwise provided in section 2a, each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel.” The Michigan Supreme Court has previously stated that the open and obvious doctrine is inapplicable where the cause of action arose from an alleged violation of MCL 691.1402. *Jones v Enertel, Inc*, 467 Mich 266, 270; 650 NW2d 334 (2002). Accordingly, the trial court erred in granting summary disposition on that basis.

However, the record demonstrates that the trial court also granted summary disposition based on its conclusion that defendant did not breach its statutory duty. In order to establish a cause of action for negligence, the plaintiff must be able to show that the defendant owed a duty to the plaintiff, the defendant breached that duty, the defendant’s breach caused the plaintiff’s injury, and that the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615

NW2d 17 (2000). In the present case, the alleged duty breached by defendant was the duty to maintain the highway in reasonable repair, as established by MCL 691.1402. When asked whether it was concluding that the road was maintained in reasonable repair, the trial court responded “absolutely.” This finding was supported by the deposition of Worthen Brown, who described how, after installing the water main, defendant's employees backfilled the site of the excavation and put in the milling. Brown also testified that it was the custom and practice of the department to cold patch the area and, although he had no specific recollection, he believed that they had done so on this occasion. Plaintiff did not present any evidence to rebut this testimony. As a result, plaintiff failed to establish any breach of duty and no genuine issue of material fact exists, making summary disposition proper pursuant to MCR 2.116(C)(10).

Additionally, plaintiff has failed to show that the government was not immune from liability. Our Supreme Court held that “the Legislature has not waived immunity if the repair is reasonable but the road is nevertheless still not reasonably safe because of some other reason.” *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 167; 713 NW2d 717 (2006). As noted above, plaintiff provided no evidence that the repair in this case was unreasonable and the trial court explicitly found that the repair was reasonable. Accordingly, summary disposition was also proper based on governmental immunity.¹ Because summary disposition was proper, albeit for different reasons than those found by the trial court, we may still affirm. *Hess v Cannon Twp*, 265 Mich App 582, 596; 696 NW2d 742 (2005).

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O’Connell
/s/ Kirsten Frank Kelly

¹ This Court agrees with plaintiff that the trial court erred in granting summary disposition on the basis of the two-inch rule, as that rule does not apply where the dangerous condition existed on the improved portion of the highway. MCL 691.1402a(2). However, because summary disposition was proper for the reasons stated in this opinion, reversal is not warranted. In addition, we take no position on plaintiff’s claim that it provided sufficient notice to defendant, as the trial court did not consider the issue of notice when it granted defendant's motion for summary disposition.